

Mr. Zalkowitz

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Request for Reconsideration]

FILE: B-197801

DATE: December 30, 1980

MATTER OF: Master Chief Petty Officer Jerry D. Banister

DIGEST: Considering his rank, years of service and the amount of overpayment, a service member's debt resulting from erroneous payments of basic allowance for quarters (BAQ) may not be waived since he should have known that continued payment of BAQ after occupancy of Government quarters was improper. The fact that he may have received assurance that his pay was correct after he questioned periodic increases in his pay provides no basis for waiver since in this circumstance the amount of the BAQ was so significant that he cannot be found to be without fault for not pursuing the matter further. Also, financial hardship resulting from collection is not a sufficient reason alone to authorize waiver.

Master Chief Petty Officer Jerry D. Banister, USN (Retired), requests reconsideration of our Claims Division's March 16, 1979 denial of his application for waiver of his debt to the United States in the total amount of \$3,218.94. The debt arose from erroneous payments of basic allowance for quarters (BAQ) made to him while occupying Government quarters in San Diego, California. The denial is sustained.

Under the pay and allowance system applicable to members of the uniformed services either Government living quarters are provided or a basic allowance for quarters is paid. A service member who is provided with suitable Government quarters for himself and his dependents "is not entitled to a basic allowance for quarters." 37 U.S.C. § 403(b) (1976). However, due to administrative error, Mr. Banister continued to receive BAQ after he was assigned Government quarters on July 10, 1974. As a result, he was erroneously paid BAQ for the period July 10, 1974, through December 31, 1975, in amounts ranging from \$172.20 to \$190.80 per month.

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Mr. Banister, in his request for waiver, has contended that he did not know or suspect that he was being overpaid, and that payment of the debt would result in extreme financial hardship. He stated that previously, the cost of housing had always been withheld from his pay whenever he occupied Government quarters. Moreover, he indicated that during the 18-month period that he received the overpayments, he was at sea for several short tours of duty totaling 200-300 days. He indicates that during his sea duty his check was mailed directly to his wife who handled his finances. Furthermore, Mr. Banister maintained that when he did question the accuracy of his pay because the amounts of his checks periodically increased during the period, he was assured by the disbursing office that his pay was correct. He was told that his pay increase was due to a raise and a decrease in income taxes. Mr. Banister further contends that his pay was decreased after he moved into Government quarters by an amount in excess of his former BAQ entitlement.

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if, in the opinion of the Comptroller General--

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having interest in obtaining a waiver of the claim * * *."

We interpret the word "fault", as used in 10 U.S.C. § 2774, as including something more than a proven overt act or omission by a member. Thus, we consider fault to exist if in light of all of the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See decisions

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B-196637, February 27, 1980, and B-193363, August 8, 1979.

In the present case, considering Mr. Banister's rank and years of service (E-9 with over 20 years), and that the termination of BAQ should have caused his pay to decrease at the minimum of \$172.20 per month, a substantial portion of his total pay, the absence of such a decrease in his pay should have been readily apparent. His pay records do not show extreme fluctuations of pay over the 18-month period which would account for his being unaware of receiving the erroneous payments of \$172.20 to \$190.80 per month. The facts that Mr. Banister was at sea for portions of the period during which the erroneous payments were being made does not explain why he did not notice the overpayments at any time during the 18-month period, a large portion of which he was not at sea. In fact, Mr. Banister's knowledge of the periodic increases in his pay indicates that he was aware of the approximate amount of his pay. Moreover, the assurance that Mr. Banister may have received from the disbursing office as to the correctness of his pay, does not absolve him of fault. Mr. Banister was not assured that the total amount of his pay was correct, but rather only to the correctness of his periodic increase in pay. Also, the fact that he may have chosen to have his wife handle the family finances does not relieve him of the responsibility for being aware of his pay entitlements in circumstances such as these.

Therefore, it is our view that Mr. Banister should have become aware sometime during the 18-month period that he was receiving money to which he was not entitled. Such knowledge on his part carried with it a duty and legal obligation to bring it to the attention of appropriate officials, to seek a full explanation of the source of the payments, and to be prepared to return the excess sums at such time as the administrative error was corrected. Since he did not do so it is our view that collection action is not against equity and good conscience nor contrary to the best interests of the United States. Further, financial hardship resulting from collection is not a sufficient reason to retain the payments that he should have known did not belong to him. B-197503, March 6, 1980.

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Accordingly, the action of our Claims Division denying waiver of \$3,218.94 was correct.

A handwritten signature in cursive script, reading "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

Acting Comptroller General
of the United States